Supreme Court, U.S.
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No. 04-1177

In The
Supreme Court of the United States

SINCLAIR BROADCAST GROUP, INC.,

Cross-Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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March 2, 2005

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QUESTIONS PRESENTED

1. Whether the Third Circuit in effect impermissibly overruled the D.C. Circuit by ordering the Federal Communications Commission ("FCC") to continue to enforce a rule that the D.C. Circuit found insufficiently deregulatory and arbitrary and capricious and that the FCC on remand from the D.C. Circuit concluded could not be justified.

2. Whether the Third Circuit in conflict with the decisions of the D.C. Circuit incorrectly applied Section 202(h) of the Telecommunications Act of 1996 and therefore failed to set aside the restrictions retained by the FCC on local television ownership.

3. Whether the Third Circuit erred in upholding, against First Amendment challenges, the local television ownership rule of the FCC that singles out and places unique restrictions on television broadcasters, on the ground that a rational basis supported the regulation.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies the parties to the proceeding in the court whose judgment is sought to be reviewed.

The petitioners below were Prometheus Radio Project, Media General, Inc., National Association of Broadcasters, Network Affiliated Stations Alliance, ABC Television Affiliates Association, CBS Television Affiliates Association and NBC Television Affiliates, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., Viacom Inc., National Broadcasting Company, Inc., Telemundo Communications Group, Inc., Sinclair Broadcast Group, Inc., Media Alliance, Paxson Communications Corporation, National Council of the Churches of Christ in the United States, Tribune Company, Emmis Communications Corporation, Center for Digital Democracy and Fairness & Accuracy in Reporting, Clear Channel Communications, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, PRLDEF-Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., and Women's Institute for Freedom of the Press.

The respondents below were the Federal Communications Commission and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states as follows:

Sinclair Broadcast Group, Inc. ("Sinclair") is a publicly held company, which operates and provides programming and sales services to television stations in various cities across the country. Sinclair has no parent company and no publicly held company owns ten percent or more of Sinclair's stock.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Sinclair Broadcast Group, Inc. ("Sinclair") respectfully requests that this Court grant its conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 373 F.3d 372 (3d Cir. 2004) and reprinted at Pet. App. 1a-189a.[1] The court of appeals' order granting and denying rehearing appears at Pet. App. 671a-673a. The court of appeals' order stating that it would not accept petitions for rehearing en banc due to recusals appears at Pet. App. 674a-675a. The order of the Federal Communications Commission ("FCC"), 2002 *Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking,* 18 FCC Rcd. 13,620 (2003) (the "*Order*"), is reprinted at Pet. App. 190a-670a.

JURISDICTION

The court of appeals entered judgment on June 24, 2004, and granted in part and denied in part a timely

[1] Pursuant to Rule 12.5, the materials already reproduced in the petitions for writ of certiorari are not reproduced here. Unless otherwise specifically indicated, all appendix cites in the conditional cross-petition are to the appendix of the Tribune Company, *et al.*

petition for rehearing on September 3, 2004. Justice Souter extended the time for filing petitions for certiorari until January 31, 2005. On January 31, 2005, this Court docketed the first of four petitions for a writ of certiorari of the court of appeals' decision. *See* docket nos. 04-1020, 04-1033, 04-1036, and 04-1045. Pursuant to Rule 12.5 of this Court, this conditional cross-petition is filed in connection with those petitions. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved in this case is the Telecommunications Act of 1996, Pub. L. No. 104-104, tit. II, § 202, 110 Stat. 56, 110-12 (uncodified), which is reproduced in the Appendix, Pet. App. 676a-679a. The FCC's ownership regulations are reproduced in the Appendix, Pet. App. 659a-670a.

STATEMENT OF THE CASE

1. In ordering the FCC to apply a rule that the D.C. Circuit found arbitrary and capricious and the FCC concluded was not "necessary in the public interest," (*Order* ¶ 133 (Pet. App. 278a)), the Third Circuit overstepped its authority and disregarded principles of the law-of-the-case doctrine. In addition to overruling in effect a coordinate court's prior decision, the Third Circuit decision created an irreconcilable conflict regarding the proper interpretation of the deregulatory mandate of Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, tit. II, § 202, 110 Stat. 56 ("1996 Act").

The 1996 Act repealed or relaxed several prohibitions on media ownership and required the FCC "to conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market." 1996 Act § 202(c)(2). Congress further directed the Commission to conduct a biennial review of all ownership rules to "determine whether any of such rules are necessary in the public interest as a result of competition." 1996 Act § 202(h).

Thereafter, in 1999 the FCC implemented a new local television ownership rule ("1999 local television ownership rule").[2] In a challenge by Sinclair, the D.C. Circuit found the 1999 local television ownership rule insufficiently deregulatory and arbitrary and capricious and required the FCC to justify it as "necessary in the public interest" or repeal or modify it as required under § 202(h) of the 1996 Act. *Sinclair v. FCC*, 284 F.3d 148, 159, 162-65 (D.C. Cir. 2002).

The FCC on remand concluded that the rule "is not necessary in the public interest to promote competition . . . [and] does not promote, and may even hinder, program diversity, and localism." *Order* ¶ 133 (Pet. App. 278a). However, the FCC maintained that a local television ownership rule was necessary and implemented a new rule (47 C.F.R. § 73.3555(b)).

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[2] The 1999 local television ownership rule is discussed in more detail in the Petition for a Writ of Certiorari by the National Association of Broadcasters ("NAB Petition"). *See* NAB Petition, docket no. 04-1033, at 10.

A number of parties filed petitions for review of the *Order* in various courts of appeals. By lottery, the Third Circuit was selected to review the petitions. On September 3, 2003, the Third Circuit granted a motion to stay the effective date of the FCC's new local television ownership rule and ordered the agency to continue to enforce the 1999 local television ownership rule, pending the outcome of the court's review. *See* Order, nos. 03-3388 *et al.* (Sept. 3, 2003), attached in the Appendix to the Petition for a Writ of Certiorari by Media General, Inc., docket no. 04-1020, at 194a-196a.

After refusing to transfer the case to the D.C. Circuit, the Third Circuit held that the FCC had not justified the relaxed numerical limits in the new local television ownership rule adopted in 2003. Pet. App. 78a. The court maintained the stay requiring the FCC to continue to enforce its 1999 local television ownership rule and retained jurisdiction to review the FCC's treatment of the television ownership rule on remand.

2. The FCC's local television ownership rules perpetuate unfair and unnecessary restrictions on television broadcasters, damaging their ability to compete with rival media companies. To point only to one graphic example, for years Sinclair has been prevented by the FCC's local television rule from owning a second station in Columbus, Ohio, that would permit it to compete effectively with much larger multi-media companies in the market.

Sinclair owns ABC affiliate WSYX(TV), the third-ranked station, and has provided programming pursuant to a grandfathered Local Marketing Agreement ("LMA") to

Fox affiliate WTTE(TV), the fourth-ranked station in the market.[3] Sinclair has on two occasions within the last three years unsuccessfully sought FCC permission to acquire WTTE(TV). In conjunction with its applications, Sinclair submitted detailed analyses demonstrating that the proposed combination would increase local news and public affairs programming and facilitate the stations' transition to digital television. Sinclair also showed that the combination would not be anticompetitive. The LMA has been in operation for more than eight years and no advertiser or competitor, to Sinclair's knowledge, has raised a complaint or expressed a concern about any anticompetitive result of this LMA. In fact, the Antitrust Division of the Department of Justice, the government agency charged with enforcing the antitrust laws, reviewed the Columbus LMA and, because of an absence of anticompetitive concerns, took no action to prohibit the LMA.

The FCC, however, on two occasions dismissed Sinclair's applications as inconsistent with the 1999 local television ownership rule.[4] Because the relevant part of the new local television ownership rule remains unchanged (47 C.F.R. § 73.3555(b)), Sinclair would still be unable to purchase WTTE(TV), without a waiver of that rule.

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[3] An LMA, sometimes known as a time brokerage agreement, "is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming." *Order* ¶ 153 n. 300 (Pet. App. 294a) (citations omitted).

[4] Sinclair has pending an Application for Review to the full Commission of the FCC's dismissal of its most recent application.

In Columbus, Sinclair must compete with two media powerhouses, the Dispatch Printing Company ("Dispatch") and Time Warner. Dispatch has been described by the trade press as a "media dynasty" and is essentially the Goliath of the Columbus market. Dispatch owns CBS affiliate WBNS-TV, the top-ranked station in Columbus whose audience share alone exceeds the combined share of WSYX(TV) and WTTE-TV. Dispatch also owns *The Columbus Dispatch* (the only daily newspaper), the Ohio News Network (a 24-hour state-wide cable news channel), and two Columbus-based radio stations. Yet, no FCC rule prohibits (or should prohibit) Dispatch's ownership interests.

Time Warner owns the dominant cable system, an extremely popular Internet service and content provider, CNN and Headline News (as well as other cable channels like HBO, Cinemax, TBS, TNT, Cartoon Network, and Turner Classic Movies), and the WB network. Time Warner is free to start a local cable news channel. Indeed, the media powerhouse can legally buy a broadcast station in the market, including a top four-ranked station, the very step that the local television ownership rule prevents Sinclair from taking.

In another market that demonstrates the irrationality of the rule, Rochester, New York, Sinclair owns Fox affiliate WUHF(TV), the fourth-ranked station in the market, and is prohibited from acquiring any other top four-ranked station as a result of the top-four restriction. Yet, Sinclair must compete with Time Warner. In addition to the substantial cable assets described above, Time Warner also operates R News (a local cable news channel) and WB16 (a local cable channel that airs WB programming and is virtually indistinguishable to cable customers from a local

television broadcast station). Time Warner may also buy any broadcast station in the market, including a top four-ranked station.

The Columbus and Rochester markets are not atypical. A survey of the media landscape reveals many other markets where television broadcasters routinely face intense competition in local markets from other multifaceted media corporations. Viacom, Inc. ("Viacom") owns over thirty television broadcast stations, predominantly in major markets like Atlanta, Boston, Chicago, Dallas/Fort Worth, Houston, Los Angeles, New York, Philadelphia, San Francisco, and Washington, D.C. It owns the national broadcast networks CBS and UPN and cable networks such as MTV, M2, VH1, Nickelodeon, Nick at Night, TV Land, Showtime Networks, the Movie Channel, Comedy Central, BET, Spike TV, and CMT. Viacom also owns over 150 radio stations. News Corporation owns one of only two Direct Broadcast Satellite ("DBS") systems (which compete with broadcasters and cable operators in every market in the United States), thirty-seven television broadcast stations, the national broadcast network Fox, the national Fox News Channel, the national cable network FX, and twenty regional cable sports networks. Yet, in many local markets the FCC's local television ownership rule prohibits broadcasters from obtaining common control of two stations (*see* NAB Petition at 12) and achieving the critical efficiencies necessary to compete on a level playing field with such multifaceted media corporations.

3. For further description of the local television ownership rule, Sinclair adopts the Statement of the Case in the NAB Petition. NAB Petition at 9-12. For further description of the proceedings below, Sinclair adopts the Statement of the Case in the Petition for a

Writ of Certiorari by the Newspaper Association of America, *et al.* ("NAA Petition"). NAA Petition, docket no. 04-1045, at 12-13.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision and stay requiring the FCC to continue to enforce the 1999 local television ownership rule that the D.C. Circuit found arbitrary and capricious and insufficiently deregulatory and that the FCC itself concluded "is not necessary in the public interest" (*Order* ¶ 133 (Pet. App. 278a)) effectively overrules the prior decision of the D.C. Circuit in *Sinclair*, 284 F.3d 148 (D.C. Cir. 2002). The Third Circuit's interpretation of § 202(h) also undermines the deregulatory goal and mandate of the 1996 Act and is irreconcilable with prior D.C. Circuit decisions interpreting the same provision. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair*, 284 F.3d 148 (D.C. Cir. 2002). This conflict is exacerbated because the Third Circuit retained jurisdiction of this case on remand but only the D.C. Circuit has jurisdiction to review challenges to the FCC's application of its media ownership rules in the context of specific transfer or assignment applications.

The FCC's local television ownership rule creates an ownership restriction that targets television broadcasters and limits their speech, but not the speech of other media companies, such as cable operators, Internet service and content providers, and satellite operators. In light of the wealth of new media outlets and sources in the modern media marketplace, the Third Circuit's conclusion that the

so-called "scarcity doctrine" continues to be a valid justification for a rational basis review of FCC regulations on broadcasters cannot be sustained, and the disparate treatment of television broadcasters violates the First Amendment.

I. THE THIRD CIRCUIT DECISION IN EFFECT IMPERMISSIBLY OVERRULES THE D.C. CIRCUIT'S DECISION IN *SINCLAIR* BY ORDERING THE FCC TO CONTINUE TO ENFORCE THE 1999 LOCAL TELEVISION OWNERSHIP RULE THAT THE D.C. CIRCUIT FOUND INSUFFICIENTLY DEREGULATORY AND ARBITRARY AND CAPRICIOUS AND THAT THE FCC SUBSEQUENTLY DETERMINED COULD NOT BE JUSTIFIED.

In *Sinclair*, the D.C. Circuit found that the 1999 local television ownership rule was insufficiently deregulatory and arbitrary and capricious and required the FCC to justify the rule on remand as "necessary in the public interest" or repeal or modify it as required under § 202(h) of the 1996 Act. *Sinclair*, 284 F.3d at 159, 162-65. The FCC on remand found that the rule "is not necessary in the public interest." *Order* ¶ 133 (Pet. App. 278a). The Third Circuit, however, stayed the effective date of the FCC's new rule and continues to require the FCC to enforce the 1999 local television ownership rule. Pet. App. 78a.

The Third Circuit's mandate to continue to enforce the arbitrary and capricious 1999 rule disregards well-established principles of law-of-the-case doctrine and in effect impermissibly overrules the D.C. Circuit's decision in *Sinclair*. *See Arizona v. California*, 460 U.S. 605, 618 (1983) (Under the law-of-the-case doctrine "when a court

decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("[A]s a rule, courts should be loathe to [revisit prior decisions of a coordinate court] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'") (citation omitted); *see also Phillips Petroleum Co. v. F.E.R.C.*, 902 F.2d 795, 799 (10th Cir. 1990) ("To the extent that issues have been decided by [a coordinate court of appeals before remand], review of those issues would be contrary to law of the case.").

The conundrum facing broadcasters is even more serious than the situation that generally arises from conflicts among the circuits, where litigants at least know what the prevailing law is in each circuit. Here, an applicant for an assignment or transfer of a television station that involves the local television ownership rule faces a stay imposed by the Third Circuit that orders the FCC to process the application pursuant to a rule that the D.C. Circuit ruled is arbitrary and capricious. And while the Third Circuit has retained jurisdiction over the local television ownership rule, the D.C. Circuit has *exclusive* jurisdiction in appeals of the FCC's decisions concerning assignment or transfer applications. 47 U.S.C. § 402.

II. THE THIRD CIRCUIT DECISION CONCERNING THE LOCAL TELEVISION OWNERSHIP RULE CONFLICTS WITH DECISIONS OF THE D.C. CIRCUIT REGARDING THE PROPER INTERPRETATION OF THE DEREGULATORY MANDATE OF SECTION 202(h).

This Court's review is necessary to resolve a conflict over the proper interpretation of the deregulatory mandate of § 202(h) of the 1996 Act. That section provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[5]

In *Fox*, the D.C. Circuit found that § 202(h) creates a presumption in favor of deregulation. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).[6] In *Sinclair*, the D.C. Circuit reiterated that conclusion

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[5] Although not relevant to this petition, in January 2004 Congress amended the 1996 Act and § 202(h), replacing "biennially" with "quadrennially."

[6] In its original opinion, the D.C. Circuit stated: "The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." *Fox*, 280 F.3d at 1050. On rehearing, the court amended that part of the decision because it concluded that the parties did not fully brief that issue and, in any event, the higher standard was not dispositive of the case, as the FCC had failed to justify the retention of its rule under even the most lenient public interest standard.

specifically in the context of rejecting the FCC's 1999 local television ownership rule as insufficiently deregulatory. *Sinclair*, 284 F.3d at 159, 162-65. The D.C. Circuit's conclusion is supported by both the express language of § 202(h) and the declared purpose of the 1996 Act "to promote competition and reduce regulation." 1996 Act pmbl. Moreover, the FCC itself acknowledged in its *Order* that § 202(h) creates a deregulatory presumption "up-end[ing] the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *Order* ¶ 11 (Pet. App. 200a).

The Third Circuit, however, held that § 202(h) creates no such presumption and, with respect to the FCC's own conclusion about the deregulatory presumption stated that the FCC was "misguided" by the *Fox* and *Sinclair* decisions. Pet. App. 33a.[7] Indeed, the Third Circuit held that the FCC had authority to implement *more restrictive* ownership limits on television station owners. Pet. App. 34a. Such a conclusion is contrary to the plain language of § 202(h) and creates an irreconcilable conflict with the D.C. Circuit's decisions in *Sinclair* and *Fox*.

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[7] In reaching that decision, the Third Circuit erroneously relied in part on a D.C. Circuit decision, *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004), involving a related but distinct statutory provision, 47 U.S.C. § 161. In *Cellco*, the D.C. Circuit held that "necessary in the public interest" in the context of the telecommunications biennial review mandate under § 11 of the 1996 Act, not § 202(h), did not require a stricter standard than the long-standing meaning of the term "necessary." *Cellco*, 357 F.3d at 98.

III. THE THIRD CIRCUIT'S AFFIRMANCE OF THE TOP-FOUR RESTRICTION VIOLATES THE DEREGULATORY MANDATE OF SECTION 202(h).

In the absence of a demonstration that mergers of top four-ranked stations actually harm the public interest in markets of any size, the FCC simply cannot prohibit such mergers under the deregulatory mandate of § 202(h), and accordingly, the Third Circuit's affirmance of the top-four restriction cannot survive scrutiny. The FCC's conclusion that mergers between top four-ranked stations should be prohibited appears to be based in large part on the erroneous and unsupported assumption that top four-ranked stations are dominant forces in every market. *See Order* ¶ 196 (Pet. App. 328a-329a). Even ignoring competition from other media sources such as cable, satellite, and the Internet, the record is replete with examples, such as Columbus, Ohio, where a market is dominated by one or two stations, and no merger by the other stations would challenge that supremacy.

Moreover, the top-four restriction, which the FCC has acknowledged targets mergers between local stations affiliated with ABC, CBS, Fox, and NBC (*Order* ¶ 196 (Pet. App. 328a-329a)), ignores the fact that network affiliations are private contractual matters over which the FCC has no jurisdiction. Stations may drop or add network affiliations at any time, and the FCC has no involvement in the process. Thus, while the FCC can use its top-four restriction to bar assignments or transfers, which require its prior approval, parties can freely change their network affiliations at other times, readily circumventing the rule.

A network shake-up in the Jacksonville, Florida market, which occurred outside the context of any top-four analysis by the FCC, provides evidence of the arbitrary

nature of the rule. In that market, Station WJXT(TV) dropped its CBS network affiliation after it was unable to reach an agreement with the network. Clear Channel, which already owns Fox affiliate WAWS(TV), picked up the CBS affiliation for its station WTEV-TV.[8] According to the latest Nielsen ratings, these two stations are presently the fourth-ranked and top-ranked stations, respectively, in the Jacksonville market. Thus, an affiliation switch enabled one licensee to own two top four-ranked stations, but the same licensee would have been arbitrarily barred by the top-four restriction from owning those same stations via an assignment or transfer.

Thus, the top-four restriction and its affirmance by the Third Circuit cannot be justified. It is based on erroneous conjecture, rather than proof, of actual competitive harm, and it is arbitrary and capricious. Accordingly, it cannot survive the deregulatory presumption of § 202(h).

IV. THE PROVISIONS OF THE LOCAL TELEVISION OWNERSHIP RULE UPHELD BY THE THIRD CIRCUIT SINGLE OUT A PARTICULAR COMMUNICATIONS MEDIUM FOR UNIQUE RESTRICTIONS ON SPEECH AND THEREFORE VIOLATE THE FIRST AMENDMENT.

The FCC limits the number of stations a television broadcaster may own in a local market, but there are no comparable ownership restrictions on other media, such as

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[8] In this same market, the Gannett Co., Inc. owns WTLV(TV), Jacksonville, the NBC affiliate and second-ranked station, and WJXX(TV), Orange Park, the ABC affiliate and fifth-ranked station. At any time, depending upon ratings, both of these stations could be top four-ranked stations yet not violate the top-four restriction.

cable, satellite, and the Internet. This is so even though the FCC recognized that broadcasters "face intense competitive pressure from alternative video programming" from such sources (*Order* ¶ 125 (Pet. App. 274a)) and that viewers unquestionably consider programming offered on cable or satellite channels as substitutes for broadcast programming. *See Order* ¶ 143 (Pet. App. 286a-287a) ("These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television stations."). In fact, the FCC's own studies conducted in conjunction with its ownership proceeding indicate that ratings for programming provided by cable networks have been steadily increasing while ratings for programming provided by broadcast networks have been on the decline. *Order* ¶ 124 (Pet. App. 273a-274a).

The FCC's disparate treatment improperly singles out a communications medium and class of speakers, triggering heightened scrutiny of the regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) ("[L]aws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State.") (citation omitted); *Minneapolis Star & Tribune Co. v. Minnesota Cmm'r of Revenue*, 460 U.S. 575, 582 (1983) (State regulation singling out the press "burdens rights protected by the First Amendment [and] cannot stand unless the burden is necessary to achieve an overriding governmental interest."); *FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984) (Heightened scrutiny applies where the statute "singles out noncommercial broadcasters

and denies them the right to address their chosen audience on matters of public importance.").[9]

As other Petitioners have demonstrated, the "scarcity doctrine" can no longer provide a basis for regulating television broadcast ownership under a rational basis test. *See* Petition for a Writ of Certiorari by Tribune Company, *et al.*, docket no. 04-1036, at 13-19; Petition for a Writ of Certiorari by Media General Petition, docket no. 04-1020, at 10-23; NAA Petition at 26-28. Dramatic changes in the video marketplace since the Court first espoused the scarcity rationale more than thirty-five years ago, including the advent of DBS service and the Internet and the proliferation of cable networks, undermine the justification for such an intrusive regulation. Thus, the FCC's local television ownership rule targeting broadcasters and burdening their ability to speak through the acquisition of and operation of television stations must be scrutinized under a stricter standard and, under that standard, invalidated.

[9] *See also* Tribune Petition at 19-24.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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MEDIA GENERAL, INC., PETITIONER

v.

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NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

TRIBUNE COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NEWSPAPER ASSOCIATION OF AMERICA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

SINCLAIR BROADCAST GROUP, INC., CROSS-PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Washington, D.C. 20530-0001

QUESTIONS PRESENTED

Section 202(h) of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 111-112, requires the Federal Communications Commission to determine periodically whether its rules governing ownership of federally licensed broadcast stations remain "necessary in the public interest," and to "repeal or modify" any such rule that the FCC determines is "no longer in the public interest." Pursuant to that directive, the FCC determined in this case to: (1) replace its ban on cross-ownership of daily newspapers and broadcast stations with a cross-media rule that permits such combinations in most markets; (2) relax its local television ownership rule to generally allow common ownership of two or (in larger markets) three television stations; and (3) modify its local radio ownership rule by tightening the rule in some respects and loosening it in other respects. The questions presented are:

1. Whether the FCC's revised broadcast ownership rules violate the First or Fifth Amendment rights of newspaper owners and broadcast station licensees.

2. Whether the FCC's revised broadcast ownership rules violate Section 202(h) of the 1996 Act.

3. Whether the FCC's revised broadcast ownership rules are supported by a reasoned analysis under the Administrative Procedure Act.

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In the Supreme Court of the United States

No. 04-1020

MEDIA GENERAL, INC., PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 04-1033

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 04-1036

TRIBUNE COMPANY, ET AL., PETITIONERS
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 04-1045

NEWSPAPER ASSOCIATION OF AMERICA, ET AL., PETITIONERS
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 04-1177

SINCLAIR BROADCAST GROUP, INC., CROSS-PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-190a[1]) is reported at 373 F.3d 372. The report and order of the Federal Communications Commission (Pet. App. 206a-723a) is reported at 18 F.C.C.R. 13,620.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. A petition for panel rehearing was granted in part on September 3, 2004 (Pet. App. 191a-193a). On November 22, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 3, 2005, and on December 21, 2004, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including January 31, 2005. The petitions in Nos. 04-1020, 04-1033, 04-1036, and 04-1045 were filed on January 28 and January 31, 2005. The cross-petition in No. 04-1177 was filed on March 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*, establishes a comprehensive framework for federal regulation of the transmission and use of radio signals in the United States. The Act establishes a federal policy of "maintain[ing] the control of the United States over all the channels of radio transmission" and "provid[ing] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act thus requires persons seeking to engage in radio or television broadcasting to obtain a broadcast license

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 04-1020.

for a limited, but renewable, period of time from the Federal Communications Commission, *ibid.*, and prohibits the assignment or transfer of any such license without the Commission's prior approval, 47 U.S.C. 309(h), 310(d).

Before it may grant, renew, or approve the assignment or transfer of a broadcast license, the Commission must conclude that such action would serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a), 310(d); see 47 U.S.C. 309(k). Among the policies the Commission has advanced in exercising its broadcast licensing responsibilities is a policy favoring diversification of mass media ownership as benefiting the public interest "by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*).

To facilitate even-handed implementation of its policies and to provide certainty to the broadcast industry, the Commission has adopted generally applicable regulations that embody its judgments about the circumstances in which the issuance, assignment, or transfer of a broadcast station license would serve the public interest. See, *e.g.*, *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-205 (1956). Those regulations have long imposed limits on the number of radio or television stations a single party may own nationally or in a local market, as well as limits on cross-ownership of broadcast stations and other media in the same market. See, *e.g.*, *ibid.* (upholding ownership limits on radio and television stations); *NCCB*, 436 U.S. at 793-802 (upholding prohibition on cross-ownership of daily newspapers and broadcast stations). The Commission deems proposed broadcast combinations that violate its ownership limits inconsistent with the public interest, absent a showing that waiver of a rule is warranted in a particular case. See *id.* at 793; *Storer Broad. Co.*, 351 U.S. at 205; *National Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943) (*NBC*).

2. In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the Commission to make a number of changes to its broadcast ownership rules. See 1996 Act § 202(a)-(f), 110 Stat. 110-111. In addition, Section 202(h) of the 1996 Act imposed a general duty on the Commission to review its ownership rules periodically to determine "whether any of such rules are necessary in the public interest as the result of competition," 110 Stat. 112, and to "repeal or modify any regulation it determines to be no longer in the public interest." *Ibid.* Section 202(h) originally directed the Commission to review its ownership rules biennially, 110 Stat. 111, but in 2004, while this case was pending in the court of appeals, Congress amended the statute to provide for Commission review every four years. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99.

In a pair of cases decided in 2002, the D.C. Circuit examined the effect of Section 202(h) on the Commission's authority to regulate broadcast ownership in the public interest. First, in *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, modified on reh'g, 293 F.3d 537 (2002), the D.C. Circuit examined the Commission's decision in the first biennial review under Section 202(h) to retain without modification existing rules on national television station ownership and on cross-ownership of television stations and cable systems in local markets. The court emphasized that "nothing in § 202(h) signals a departure from [the] historic scope" of the Commission's public interest authority. *Id.* at 1042. The court concluded that Section 202(h) requires the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision that accounts for the state of competition in the relevant media markets.[2] See *id.* at

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[2] The *Fox* panel initially interpreted the phrase "necessary in the public interest" in Section 202(h) to mean that a "regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." 280 F.3d at 1050. On rehearing, the panel modified its decision to leave open

1042, 1044. Because, in the court's view, the Commission had not adequately explained its decision to retain the national television and cable-television cross-owner rule, the court remanded those rules to the Commission for further consideration. [3]

In *Sinclair Broadcast Group, Inc.* v. *FCC*, 284 F.3d 148 (2002), the D.C. Circuit remanded (but did not vacate) the Commission's 1999 revision of the local television ownership rule. The revised rule allowed common ownership of two television stations in a local market where neither station is among the top-four rated stations in the market (the "top-four" test) and the market contains at least eight other "voices," which the Commission defined as independently owned and operating, full-power television stations. The *Sinclair* court recognized that the Commission "has wide discretion to determine where to draw administrative lines." *Id.* at 162, 170 (internal quotation marks omitted). The court remanded the rule, however, because it concluded that the Commission had not adequately explained why it counted only television stations as voices in the local television ownership rule, while counting other media outlets (including daily newspapers and cable systems) as voices in its rule governing cross-ownership of radio and television stations. *Id.* at 164.

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the question of the standard that the Commission must meet under Section 202(h). 293 F.3d at 541. In *Cellco Partnership* v. *FCC*, 357 F.3d 88 (2004), the D.C. Circuit subsequently held that the Commission reasonably interpreted similar language in Section 11 of the Communications Act, 47 U.S.C. 161, to require it only to "reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule—that [the rule] was needed to further the public interest—remains valid." 357 F.3d at 98 (internal quotation marks omitted).

[3] Although the *Fox* court vacated the cable-television cross-ownership restriction, it remanded the national television ownership rule without vacating it because the court concluded that the Commission might be able to justify retention of the rule on remand. 280 F.3d at 1049.

3. In September 2002, the Commission initiated its third biennial proceeding under Section 202(h) to review its broadcast ownership rules. *2002 Biennial Regulatory Review*, 17 F.C.C.R. 18,503 (2002). The 2002 biennial review sought comment on the D.C. Circuit's decisions in *Fox* and *Sinclair*. *Id.* at 18,508-18,512 ¶¶ 12-19. The proceeding also incorporated other rulemaking proceedings that the Commission had previously initiated to reexamine its regulations governing local radio station ownership and cross-ownership of daily newspapers and broadcast stations. *Id.* at 18,506 ¶ 7.

The consolidated biennial review proceeding culminated on July 2, 2003, with the release of the Report and Order at issue in this case. As relevant here, the Report and Order established a single new cross-media rule to govern cross-ownership of daily newspapers, television stations, and radio stations, and modified two other rules that limit common ownership of multiple radio and multiple television stations in a local market.

Cross-media rule. The cross-media rule replaced, *inter alia*, the blanket prohibition on common ownership of daily newspapers and broadcast stations that this Court upheld in *NCCB*. The cross-media rule prohibits combinations involving a daily newspaper and a broadcast station, or a radio station and a television station, in local markets with three or fewer television stations. Pet. App. 521a-522a (Order ¶ 454); 04-1036 Pet. App. 661a. In local markets that have four to eight television stations, such cross-media combinations are permitted with certain limitations. Pet. App. 530a (Order ¶ 466); 04-1036 Pet. App. 661a. In local markets with nine or more television stations, the Commission imposed no cross-media limit. Pet. App. 534a (Order ¶ 473).

Local television ownership rule. In response to the decision in *Sinclair*, the Commission relaxed the local television ownership rule by replacing the "eight-voice" test with a tiered approach in which ownership limits are tied to the number of television stations in the market. Under the revised rule, a party may

own two commercial television stations in individual markets with 17 or fewer television stations and three commercial stations in markets with 18 or more television stations. Pet. App. 290a-291a (Order ¶ 134); 04-1036 Pet. App. 660a-661a. The revised rule continues to prohibit combinations involving the four highest-rated television stations in the market. Pet. App. 331-332a (Order ¶ 186); 04-1036 Pet. App. 661a. That "top four" restriction thus precludes common ownership of multiple television stations in markets with four stations or fewer.

Local radio ownership rule. The Commission did not modify the numerical limits in the local radio ownership rule, which Congress had directed the Commission to establish in the 1996 Act. See 1996 Act § 202(b), 110 Stat. 110. The Commission did revise the method of determining the scope of the radio market to which the fule's numerical limits apply, Pet. App. 390a-391a (Order ¶¶ 273-274); it required inclusion of noncommercial radio stations when counting the number of radio stations in the market, *id.* at 408a (Order ¶ 295), see 04-1036 Pet. App. 659-660a; and it counted certain agreements concerning the sale of radio advertising (commonly called "Joint Sales Agreements") as ownership interests for purposes of applying the ownership limits, Pet. App. 422a-429a (Order ¶¶ 316-325); see also 04-1036 Pet. App. 664a-665a.[4]

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[4] The 2002 biennial review also addressed two other rules related to ownership of television stations. The Commission decided to retain its "dual network" rule, which prohibits mergers among the top-four broadcast television networks (ABC, NBC, CBS, and Fox). Pet. App. 610a-629a (Order ¶¶ 592-621). That decision was not challenged in the court of appeals. In addition, the Commission relaxed its national television ownership rule to allow common ownership of television stations that reach 45% (as opposed to the previous limit of 35%) of the national television audience. *Id.* at 552a-610a (Order ¶¶ 499-591). In 2004, while this case was pending before the court of appeals, Congress amended the 1996 Act to increase the national television audience reach limitation from 35% to 39%, and provided that rules relating to that limitation would no longer be subject to the now-quadrennial review

4. Petitions for review were filed in several circuits, triggering a judicial lottery under 28 U.S.C. 2112(a)(3). The Third Circuit was selected to review the Commission's decision. On September 3, 2003, the court of appeals stayed the Commission's revised rules pending its review of the Report and Order. Pet. App. 194a-196a. The court also declined to transfer the case to the Court of Appeals for the District of Columbia Circuit. *Id.* at 197a-205a.

5. a. On June 24, 2004, the Third Circuit issued its decision on the merits. All three judges on the panel determined that the Commission's limits on broadcast ownership do not violate the First and Fifth Amendment rights of newspaper owners and broadcasters. Pet. App. 45a-48a.[5] The court stated that petitioners' First Amendment arguments were foreclosed by *NCCB*, in which this Court upheld the nationwide ban on newspaper-broadcast cross-ownership as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 46a (quoting *NCCB*, 436 U.S. at 802). In addition, the court stated that, even if *NCCB* did not control, it would assess petitioners' First Amendment challenge under rational-basis review in light of the continuing physical scarcity of broadcast spectrum. *Id.* at 47a (noting that "many more people would like access to [broadcast spectrum] than can be accommodated"). Similarly, the court of appeals concluded that petitioners' equal protection claims were foreclosed by this Court's rejection in *NCCB* of an equal protection challenge to the newspaper-broadcast cross-ownership restriction. *Id.* at 45a-46a. The court added that the devel-

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process. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99. The court of appeals in this case found that the challenge to that limitation was thereby rendered moot. See Pet. App. 36a-38a.

[5] Although Chief Judge Scirica did not join the panel majority's analysis of the petitioners' constitutional claims, his conclusion that the Commission's ownership rules should have been affirmed is an implicit rejection of such claims. See Pet. App. 190a.

opment of more media outlets since *NCCB* was not a basis for reaching a different result, because it could not be "assumed that these media outlets contribute significantly to viewpoint diversity as sources of *local* news and information." *Id.* at 46a (emphasis added).

The court likewise rejected petitioners' arguments that Section 202(h) of the 1996 Act limited the Commission's authority to adopt more restrictive ownership rules and imposed a heightened burden on the Commission to justify any ownership limits that it decides to retain. Pet. App. 26a-36a; see *id.* at 124a (Scirica, J., dissenting) ("[T]he statute does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest.").

b. In a portion of the panel opinion from which Chief Judge Scirica dissented, the court of appeals concluded that the Commission's cross-media rule and local television and radio rules should be remanded for "additional justification or modification." Pet. App. 12a. For each of the three rules, the majority rejected the specific limits that the Commission had adopted (or, in the case of the local radio rule, retained). The majority emphasized that it was not passing final judgment on the ultimate permissibility of the particular ownership limits chosen by the Commission. Instead, the court stated, "the Commission gets another chance to justify its actions." *Id.* at 12a n.3.

Cross-Media Rule. The court of appeals held that the Commission's determination that "the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest" was "justified under § 202(h) [of the 1996 Act] and is supported by record evidence." Pet. App. 40a; see *id.* at 40a-44a. But the court concluded that some aspects of the Commission's new cross-media rule, which replaced the newspaper/broadcast cross-ownership ban, were not supported by a "reasoned analysis." *Id.* at 48a. The majority focused its criticism on the Commission's use of a Diversity Index, a tool based loosely on the

Herfindahl-Hirschman Index used in antitrust analysis, to inform its judgment in setting ownership limits for local media markets of various sizes. See *id.* at 49a. In particular, the majority rejected the Commission's decision to evaluate diversity by assigning equal weight to "all outlets within the same media type (that is, television stations, daily papers, or radio stations)." *Id.* at 58a. The court also found the Diversity Index flawed because, in the view of the panel majority, it "gave too much weight to the Internet as a media outlet," *id.* at 49a, and "allow[ed] some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed," *id.* at 63a.

Local Television Ownership Rule. The court of appeals likewise remanded, for further consideration by the agency, the specific local television ownership limits that the Commission had adopted. Pet. App. 76a-79a. In constructing the local television rule, the Commission had begun with the goal of preserving six equal-sized competitors (see *id.* at 335a-336a (Order ¶ 192)), and, except for purposes of applying the top-four restriction, it treated each television station in the market as having equal significance. *Id.* at 76a. The court upheld the Commission's decision to retain the top-four restriction. But, in line with its analysis of the cross-media limits, the panel majority stated that in its view "no evidence" supported the Commission's equal weighting of local stations in setting ownership limits and further concluded that such weighting was unreasonable insofar as it allowed concentration—as measured by audience share—to exceed a Herfindahl-Hirschman Index level of 1800. *Id.* at 78a; see generally U.S. Dep't of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1.5 (rev. Apr. 8, 1997) (designating markets with a level above 1800 as "highly concentrated"). The court therefore remanded the numerical limits for local television ownership "for the Commission to support and harmonize its rationale." Pet. App. 79a.

Local Radio Ownership Rule. The court upheld much of the Commission's approach to local radio ownership, including the Commission's decision to adopt a new methodology for delineating local radio markets, Pet. App. 90a, and to count noncommercial stations and Joint Sales Agreements for purposes of applying the ownership rules, *id.* at 90a-91a, 96a-99a. But the court concluded that the Commission's decision to retain the specific ownership limits that had been adopted by Congress in 1996 was not supported by "reasoned analysis." *Id.* at 102a. In doing so, the panel majority again rejected the Commission's reliance on a benchmark that evaluated competition or diversity in terms of number of outlets rather than audience shares. *Id.* at 104a-106a. In the majority's view, "[i]t defies logic to assume that a combination of top-ranked stations is the competitive equal to a combination of low-ranked stations just because the two combinations have the same number of stations." *Id.* at 104a.

c. Chief Judge Scirica dissented from the court of appeals' decision to remand the FCC's ownership rules. In the Chief Judge's view, the majority had "substituted its own policy judgment for that of the * * * Commission." Pet. App. 108a. Noting that "[i]t is not the role of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority," the Chief Judge explained that he would have upheld the order on review, lifted the stay, and allowed the Commission's revised rules to go into effect. *Ibid.*

6. In issuing its decision, the court of appeals extended its stay of the Commission's revised broadcast ownership rules "pending [the court's] review of the Commission's action on remand." Pet. App. 107a. On September 3, 2004, in response to the government's petition for panel rehearing, the court partially lifted its stay to permit the Commission's revised local radio ownership rules—which the court had largely upheld—to go into effect. *Id.* at 193a. The court denied the government's rehearing

petition in other respects, however, and the cross-media limits and the local television ownership rules remain stayed.

ARGUMENT

Petitioners in this case are newspaper and broadcast industry parties, most of whom challenged the Commission's ownership regulations in the court of appeals. In Nos. 04-1020, 04-1036, and 04-1045, petitioners contend that the ownership regulations, particularly the cross-media rule, violate the First and Fifth Amendments to the United States Constitution. In Nos. 04-1033, 04-1036, and 04-1045, petitioners assert that the ownership rules under review had to be relaxed further—and could in no event be tightened—under Section 202(h) of the 1996 Act. Finally, petitioners in No. 04-1045—who intervened in the court of appeals in support of the FCC's cross-media rule—seek review of the Third Circuit's decision to remand and stay, rather than affirm, the Commission's revised ownership rules. None of the petitions raises any issue that merits further review by this Court in the present posture of the case.

I. FURTHER REVIEW IS UNWARRANTED BECAUSE OF THE INTERLOCUTORY POSTURE OF THIS CASE

1. This case is in an interlocutory posture and therefore does not provide an appropriate vehicle for addressing petitioners' claims. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (declining to exercise certiorari jurisdiction where the court of appeals had remanded the case); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.); see generally Robert Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). That is particularly true with respect to petitioners' constitutional claims, which ask this Court to reconsider long-established doctrines and overrule past precedents against the backdrop of an unsettled regulatory regime.

Had the Third Circuit upheld the new broadcast ownership rules, this case would have presented the question whether those otherwise-valid rules could survive the stricter constitutional standards petitioners advocate. The court of appeals, however, rejected aspects of the Commission's explanations of those rules and generally stayed the rules' effectiveness pending reconsideration by the FCC on remand. In the current posture of this case, therefore, there is an unreversed determination that the Commission failed adequately to justify the new rules under ordinary, nonconstitutional standards applicable to judicial review of administrative action. In light of that ruling, and absent this Court's review of the court of appeals' case-specific application of the Administrative Procedure Act standards to the FCC's determinations, the case does not present at this time the question whether the new rules are constitutional.

Nor does this case squarely present the question whether the prior broadcast ownership rules would satisfy the new, more stringent constitutional standard petitioners advocate. The old rules were not challenged in this proceeding and, although they are temporarily now back in force due to the Third Circuit's stay of the new rules, they are likely to be changed as a result of the remand proceedings. Petitioners' constitutional challenges are thus in effect directed to future rules—as yet unadopted—that the Commission may choose to promulgate after remand, and not to any ownership rules in place today.

As this Court has long emphasized, weighty prudential considerations counsel against unnecessary pronouncements on constitutional matters; without a concrete application of the constitutional standard to a particular governmental action or rule, the Court cannot be certain that resolution of a constitutional issue is necessary.[6] The Court's reluctance to entertain abstract issues of

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[6] See, *e.g.*, *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of

constitutional law is also based on the benefits to the Court's decisionmaking process of the context provided by a particular concrete dispute; such a context is likely to help focus the Court's attention on important aspects of the legal problem and on consequences of the Court's decision that might otherwise be obscured. Because "all contingencies of attempted enforcement cannot be envisioned in advance of those applications," this Court has "found it wiser to delay passing upon the constitutionality" of a statute or regulation "until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson* v. *Buck*, 313 U.S. 387, 402 (1941).

2. The interlocutory posture of the case also counsels against further review of the nonconstitutional issues presented by petitioners. In remanding the FCC's revised ownership rules, the Third Circuit correctly articulated the deferential standard of review that courts must apply in examining the Commission's ownership rules. See, *e.g.*, *NCCB*, 436 U.S. at 794; *NBC*, 319 U.S. at 219. Moreover, the court of appeals emphasized that it was not finally passing judgment on the validity of the new broadcast ownership rules, but was merely remanding for what it perceived to be an inadequacy in the Commission's justification for "certain aspects" of the new rules. Pet. App. 11a. In response to the claim that "the Commission's work * * * comes close enough to merit our approval," the court's response was "not yet." *Id.* at 12a n.3; see *ibid.* ("[T]he Commission gets another chance to justify its actions.").[7] Although the government believes the court erred in

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constitutionality * * * unless such adjudication is unavoidable."); see also *Minnick* v. *California Dep't of Corr.*, 452 U.S. 105, 122 n.30 (1981); *Rescue Army* v. *Municipal Ct.*, 331 U.S. 549, 568-569 (1947).

[7] See also Pet. App. 58a ("On remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable."); *id.* at 61a ("[W]e remand for the Commission's additional consideration of this aspect of the Order."); *id.* at 79a ("We remand the numerical limits for

failing to uphold the new rule, the factbound question whether the Commission adequately provided sufficient justifications for its new rules does not warrant further review. The Third Circuit's decision to remand rather than affirm was thus a "misapplication of a properly stated rule of law" that does not warrant the exercise of this Court's certiorari jurisdiction if the case is not otherwise before the Court on the merits. Sup. Ct. R. 10. The Court should deny review in this case and allow the Commission on remand to decide what broadcast ownership rules are appropriate, and to explain why they are justified.

II. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CONSTITUTIONAL CHALLENGES TO THE FCC'S BROADCAST OWNERSHIP REGULATIONS

A. The FCC's Broadcast Ownership Rules Are Not Subject to Heightened Scrutiny Under the First Amendment

1. The court of appeals applied settled law when it concluded that the FCC's broadcast ownership rules must be upheld under the First Amendment if they are "rationally related to a substantial governmental interest." Pet. App. 47a. It is "well established" that Congress "has power to regulate the use of [broadcast spectrum as] a scarce and valuable national resource," and to "ensure through the regulatory oversight of the FCC that only those who satisfy the 'public interest, convenience, and necessity' are granted a license to use radio and television broadcast frequencies." *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 (1984) (quoting 47 U.S.C. 309(a)). As this Court stated in *NCCB*, "nothing in the First Amendment * * * prevent[s] the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." 436 U.S. at 799. "Denial of a station license" on public interest grounds, "if

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the Commission to support and harmonize its rationale."); *id.* at 102a ("We thus remand for the Commission's additional justification.").

valid under the Act, is not a denial of free speech." *NBC*, 319 U.S. at 227.

There is no basis for Tribune's assertion (04-1036 Pet. 13) that the Third Circuit's decision creates "conflict and uncertainty" regarding the First Amendment analysis applicable to the FCC's ownership regulations. Although Tribune cites (04-1036 Pet. 14) individual judges who have expressed a range of views on the proper First Amendment analysis of broadcast regulation generally, the critical views cited by petitioners were generally directed at *content* regulation, not *ownership* regulations like those at issue here.[8] The courts of appeals that have reviewed the FCC's broadcast ownership regulations uniformly have applied the same, established standard. See *Fox*, 280 F.3d at 1046 ("the deferential review undertaken by the Supreme Court in *NCCB* and *NBC* is also appropriate here"); *Sinclair*, 284 F.3d at 168 ("Sinclair does not have a First Amendment right to hold a broadcast license where it would not [under the Commission's ownership regulations] satisfy the public interest."). There is no conflict in the circuits on the constitutional issues petitioners present.

The Third Circuit held (Pet. App. 46a), and Media General effectively concedes (04-1020 Pet. 25). that petitioners' constitutional contentions are "foreclosed" by this Court's decision in *NCCB*. Petitioners nonetheless contend (04-1020 Pet. 22-23; 04-1036 Pet. 13, 15-16; 04-1045 Pet. 26) that the growth in the number of licensed broadcast stations since *NCCB*, and the development of non-broadcast media outlets, justify overruling *NCCB* and mandating heightened scrutiny of the FCC's ownership regulations under the First Amendment. The Third Circuit correctly rejected that argument and its reliance on changed market condi-

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[8] The only decision of a court of appeals—as opposed to opinions by individual judges—cited by Tribune concerned whether the FCC could engage in "political content regulation" of broadcasting speech, *Telecommunications Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 506 (D.C. Cir. 1986), and the court's discussion focused on that issue.

tions. Pet. App. 47a. As stated in *NCCB* and other decisions of this Court, deference to the FCC's licensing policies arises from the bedrock principle that access to radio frequencies, "unlike other modes of expression, * * * is subject to governmental regulation" because there is a "fixed natural limitation upon the number of stations that can operate without interfering with one another." *NBC*, 319 U.S. at 213, 226. See *NCCB*, 436 U.S. at 799 ("[B]ecause of problems of interference between broadcast signals," only "a finite number of frequencies"—"far exceeded by the number of persons wishing to broadcast"—"can be used productively."); see also *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 637 (1994) ("The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium."). In the Communications Act, Congress addressed those physical limits by exercising federal "control * * * over all the channels of radio transmission," 47 U.S.C. 301, and vesting in the FCC the responsibility for ensuring that access to broadcast spectrum is provided only in accordance with the "public interest." 47 U.S.C. 301, 309(a), 310(d); see also *NBC*, 319 U.S. at 214-215, 226.

As this Court has consistently held, the FCC's lawful exercise of its licensing authority does not violate the constitutional rights of those who are denied broadcast licenses, because the "right of free speech does not include * * * the right to use the facilities of radio without a license." *NBC*, 319 U.S. at 226-227; see *NCCB*, 436 U.S. at 799. Although there are today more broadcast and non-broadcast outlets than there were when the *NCCB* decision was rendered, it remains the case that "many more people would like access to [spectrum] than can be accommodated." Pet. App. 47a; see *Turner*, 512 U.S. at 637 (noting that there are "more would-be broadcasters than frequencies available in the electro-

magnetic spectrum"). The core reason for deferential review of the Commission's licensing policies therefore continues in force.[9]

Of course, as the Commission has found, the modern growth in media outlets is relevant to setting an appropriate limitation on common ownership as a matter of communications policy. For instance, the Commission concluded in this case that the presence of numerous competing media outlets in most markets warranted relaxation of the prior "blanket prophylactic ban on newspaper-broadcast combinations," Pet. App. 432a (Order ¶ 330); see also *id.* at 461a-464a (Order ¶¶ 365-367), and the court of appeals agreed in principle, see Pet. App. 40a-44a. The Commission's new cross-media rule takes account of those marketplace changes by permitting newspaper-broadcast combinations in markets with four or more television stations—markets in which 97% of the U.S. population reside—and eliminating cross-ownership restrictions entirely in large media markets (including the Tampa Bay market highlighted by Media General, see 04-1020 Pet. 5-6). The FCC's decision to ease ownership restrictions, however, does not suggest that deferential judicial review of those restrictions is no longer required.

2. Instead of grappling with this Court's controlling decisions in *NCCB* and *NBC*, petitioners focus their attack on the Court's

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[9] Contrary to Media General's contention (04-1020 Pet. 12-13), this Court's settled analysis of broadcast regulation is entirely consistent with the Court's determination in *Turner* and *Reno* v. *ACLU*, 521 U.S. 844 (1997), not to apply the mode of analysis employed in *NBC* and *NCCB* to regulation of cable television and the Internet. As the Court explained, those other media do not present the same physical scarcity and interference concerns that necessitate governmental licensing of broadcast spectrum. See *Turner*, 512 U.S. at 639 ("given the rapid advances in fiber optics and digital compression technology," cable does not suffer from broadcasting's "inherent limitations," "[n]or is there any danger of physical interference between two cable speakers attempting to share the same channel."); *Reno*, 521 U.S. at 870 (noting that the Internet "can hardly be considered a 'scarce' expressive commodity" because "[i]t provides relatively unlimited, low-cost capacity for communications of all kinds.").

decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). In *Red Lion*, this Court considered whether the FCC's former "fairness doctrine," which required broadcasters to "give adequate coverage to public issues" that "accurately reflects * * * opposing views," violated broadcasters' First Amendment rights. *Id.* at 377. The Court recognized that the fairness doctrine imposed on broadcasters a duty to air views and opinions with which they may not have agreed. *Id.* at 392 (noting that the fairness doctrine prevented broadcasters from "communicat[ing] only their own views on public issues" and "permit[ting] on the air only those with whom they agreed."). The Court concluded, however, that "licensees given the privilege of using scarce radio frequencies" may be required "to share [their] frequenc[ies] with others" and to act as "prox[ies] or fiduciar[ies] with obligations to present those views and voices which are representative of [their] communit[ies]." *Id.* at 389, 394. *Red Lion* remains good law. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 237, 241 (2003) (citing *Red Lion*).

Petitioners contend that the FCC's own determination in 1987 that the scarcity of broadcast frequencies no longer justified retention of the fairness doctrine, see *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990), calls into question the deferential review that courts have traditionally accorded the FCC's broadcast ownership rules. 04-1020 Pet. 19-20; 04-1036 Pet. 16-17; 04-1045 Pet. 26-27 n.17. There is no basis for that view. In repealing its fairness doctrine, the Commission determined that, in light of the development of new media outlets, spectrum scarcity in itself no longer justified the "intrusive type of content-based regulation" that the fairness doctrine imposed on broadcasters' editorial discretion. *Syracuse Peace Council*, 2 F.C.C.R. at 5054 ¶ 76; see *id.* at 5054 ¶ 72, 5068 nn.201-202. The Commission stressed, however, that "technological advancements * * * have not eliminated spectrum scarcity," *id.* at 5055 ¶ 78, and that its

analysis of the constitutionality of the fairness doctrine had no "relevance to the Commission's allocational and licensing function." *Id.* at 5069 n.204. Insofar as any doubt remained, the Commission later "ma[d]e clear that the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny has been rejected by Congress, this Commission, and the courts." *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19,973, 19,979 ¶ 17 (2000); see *Radio-Television News Dirs. Ass'n* v. *FCC*, 229 F.3d 269 (D.C. Cir. 2000) (related reference). *Syracuse Peace Council* thus provides no support for petitioners' position. The physical limitations of the broadcast airwaves continue to justify the Communications Act's system for "allocat[ing] broadcast licenses in the 'public interest.'" *NCCB*, 436 U.S. at 795.[10]

Equally unconvincing is petitioners' contention that Congress has sent a "signal" that the FCC's ownership regulations should be subject to a higher level of scrutiny under the First Amendment. See 04-1036 Pet. 16 (quoting *League of Women Voters*, 468 U.S. at 376 n.11); 04-1045 Pet. 26-27 n.17. Congress has not in

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[10] Contrary to Tribune's contention (04-1036 Pet. 15), the Commission's determination that relaxation of the prior newspaper-broadcast cross-ownership prohibition (and its proposed elimination in larger markets) can produce public interest benefits in terms of local news coverage does not affect the constitutional analysis of continued cross-media limits in small- and mid-sized markets. *NCCB* recognized that, in giving effect to the public interest, the Commission must balance the goal of promoting diversity of ownership with the "sometimes conflicting" public interest goal of ensuring "the best practicable service to the public." 436 U.S. at 782 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965)). The Communications Act does not require the Commission to give either policy "controlling weight in all circumstances," but leaves that "weighing of policies" under the public interest standard to the Commission's judgment "in the first instance." *Id.* at 810. In this case, the Commission balanced the public interest benefits from broadcaster/newspaper combinations against the significant increases in concentration that can result from such combinations in small to medium size markets. Pet. App. 528a-533a (Order ¶¶ 462-471).

relevant respects amended or repealed the provisions of the Communications Act that confer on the Commission the authority to regulate the distribution of broadcast licenses in the public interest (see pp. 2-3, *supra*), nor has it enacted any statute that directs reviewing courts to apply heightened scrutiny to the FCC's ownership regulations. Petitioners' suggestion of a congressional "signal" is particularly weak with respect to rules restricting cross-ownership of newspapers and broadcast stations: Between 1988 and 1996, Congress prohibited the FCC from making any changes to the former newspaper-broadcast cross-ownership prohibition,[11] and, notwithstanding the fact that Congress in the 1996 Act directed the FCC to modify or reevaluate several of its then-existing media ownership rules, it did not mention that prohibition at all.

3. There is no basis for Media General's argument (04-1020 Pet. 26-30) that, notwithstanding this Court's holding in *NCCB* that newspaper/television cross-ownership regulations "are not content related," 436 U.S. at 801, the broadcast ownership rules should be subject to heightened scrutiny as content-based restrictions on speech. The "principal inquiry in determining content

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[11] See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2136; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 797; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1846; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1166-1167; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies 1995 Appropriations and 1994 Supplemental Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1738.

neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); cf. *Turner*, 512 U.S. at 643 ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."). This Court and lower courts have consistently and correctly regarded the FCC's broadcast ownership regulations as content-neutral, because the regulations do not turn on—and the FCC in applying the regulations does not examine—the content of any message an applicant for a broadcast license may seek to convey. *NCCB*, 436 U.S. at 801; *Fox*, 280 F.3d at 1046 (ownership regulations are "structur[al]," not "content-based"); see *NBC*, 319 U.S. at 226.

B. The Cross-Media Rule Does Not Violate The Due Process or Equal Protection Principles of the Fifth Amendment

Petitioners contend (04-1020 Pet. 23-25; 04-1036 Pet. 19-24) that the cross-media rule violates due process and equal protection principles because it limits cross-media combinations among daily newspapers, television stations, and radio stations, but not cable systems, Internet websites, and other information-delivery technologies. It is well established, however, that "the fact that a law singles out a certain medium" for different treatment does not by itself establish a constitutional concern. *Turner*, 512 U.S. at 660 (citing *Leathers* v. *Medlock*, 499 U.S. 439 (1991)). Such distinctions are permitted where "'justified by some special characteristic of' the particular medium being regulated." *Turner*, 512 U.S. at 660-661 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Rev.*, 460 U.S. 575, 585 (1983)).

Because daily newspapers, television stations, and radio stations are the "three media platforms that Americans turn to most often for local news and information," Pet. App. 520a (Order ¶ 452), the public interest goal of promoting diversity of ownership and viewpoint is more affected by consolidation among

broadcast stations and newspapers than by combinations involving other types of media. Focusing the cross-media rule on those media protects diversity while avoiding unnecessary regulation of other industries. Cf. *Turner*, 512 U.S. at 661 (given that non-cable video delivery systems do not present the "bottleneck" control or threat to the survival of broadcast television stations posed by cable systems, "[i]t should come as no surprise * * * that Congress decided to impose the must-carry obligation upon cable operators only").

There is no basis for Tribune's assertion (04-1036 Pet. 22-23) that the Third Circuit's equal protection holding conflicts with decisions of other courts of appeals. The Fourth and Ninth Circuit decisions that Tribune cites were both vacated by this Court, see 516 U.S. 415, 1155-1156 (1996), and, in any event, both of those circuits agreed with the Third Circuit's conclusion below that *NCCB* controlled the constitutional analysis of newspaper-broadcast cross-ownership restrictions. See *Chesapeake & Potomac Tel. Co.* v. *United States*, 42 F.3d 181, 191-192 (4th Cir. 1994); *U.S. West* v. *United States*, 48 F.3d 1092, 1098 (9th Cir. 1994). In *News American Pub'g, Inc.* v. *FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988), it was critical to the court's analysis that the challenged prohibition was "structural only in form, as it applies to a closed class of one publisher broadcaster."

Petitioners' contention (04-1020 Pet. 24; 04-1036 Pet. 20-21) that the FCC was constitutionally required to apply the cross-media rule to cable systems and Internet websites ignores the particular characteristics of those media and the limitations of the record before the Commission. As the Commission explained below, its analysis of diversity focused on likely sources of *local* news and public affairs programming. Pet. App. 489a-490a (Order ¶ 406). The Commission did not treat cable systems or networks as a significant contributor to viewpoint diversity, because there was insufficient reliable record evidence on the extent to which consumers rely on cable television for such programming.

Id. at 494a-495a (Order ¶ 414). See *NCCB*, 436 U.S. at 815 (upholding divestiture of newspaper-broadcast combinations in small markets on the basis that other forms of media did not make similar contributions to viewpoint diversity in local markets). With respect to the Internet, it would have made little sense to apply the cross-media rule to that medium; although the Commission originally concluded (in findings set aside below) that the Internet contributes to diversity in local markets, the Internet is not itself "owned"—or otherwise controlled—by any single party, and the multiplicity of Internet outlets would make it virtually impossible to develop a meaningful or workable cross-ownership rule in that context.

III. SECTION 202(h) DOES NOT IMPAIR THE COMMISSION'S AUTHORITY TO ADOPT AND REVISE ITS OWNERSHIP RULES

1. The Third Circuit correctly rejected NAB's argument (see 04-1033 Pet. 19-25) that the FCC's decision to revise the definition of radio markets and to count Joint Sales Agreements as broadcast interests violated the 1996 Act because those changes had the effect of making the local radio ownership rule more restrictive. Pet. App. 34a; see *id.* at 124a n.98 (Scirica, J., dissenting). The FCC's broad powers under the Communications Act to advance the public interest have traditionally included the power to impose additional restrictions on media ownership. See *NCCB*, 436 U.S. at 780-781. As the court of appeals correctly observed, "Congress gave no express indication [in the 1996 Act] that it intended to restrict the Commission's rulemaking authority" to adopt such restrictions where supported by the agency record. Pet. App. 34a n.18 (citing *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613 (1991) ("[I]f Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted[,] * * * we would have expected it to do so in language expressly describing an exception [to that authority].")); see *id.* at 124a (Scirica, C.J.,

dissenting) (stating that the 1996 Act "does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest").

Contrary to the contentions of NAB and Clear Channel (04-1033 Pet. 20-21; Clear Channel Br. 21), Congress's decision to set the permissible levels of common ownership in Section 202(a) of the 1996 Act does not constrain the FCC's authority to regulate broadcast ownership in the public interest. See Pet. App. 34a. Indeed, Section 202(h) of the same statute expressly directs the FCC to determine whether to "repeal *or modify*" ownership rules that may no longer promote the public interest. 110 Stat. 112 (emphasis added). As the court of appeals recognized (Pet. App. 34a), Congress's use of the term "modify," in conjunction with the continued emphasis on the "public interest" in Section 202(h), refutes the argument that Congress intended through Section 202(a) to effectuate a drastic reduction in the scope of the FCC's traditional licensing authority. Rather, the 1996 Act's congressionally specified revisions to the Commission's rules—including those to the radio ownership rules—"determined only the starting point from which the Commission was to assess the need for further change." *Fox*, 280 F.3d at 1043.

2. Contrary to petitioners' suggestion (04-1033 Pet. 24, 29; 04-1036 Pet. 25; 04-1045 Pet. 19-20; see Clear Channel Br. 24-26), the Third Circuit's interpretation of Section 202(h) in this case does not conflict with the D.C. Circuit's decisions in *Fox* and *Sinclair*. In *Fox*, the D.C. Circuit interpreted Section 202(h) to require the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision. See 280 F.3d at 1042, 1044. Likewise, the court in *Sinclair* concluded that the Commission "has wide discretion to determine where to draw administrative lines," 284 F.3d at 162 (internal quotation marks omitted), but that the Commission must "provide a reasoned explanation for its action," *ibid.* In stating that the Commission's decision to retain, modify, or repeal an ownership rule must

be supported by a "reasoned analysis," the Third Circuit articulated essentially the same standard in this case. See Pet. App. 34a-36a. And as the Third Circuit recognized, the D.C. Circuit has now made clear that Congress's direction that the Commission retain only those rules that are "necessary in the public interest" means only that a retained rule must be useful in serving the public interest. Pet. App. 30a-33a (discussing *Cellco P'ship* v. *FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004)).[12]

IV. THE CONDITIONAL CROSS-PETITION IN NO. 04-1177 SHOULD BE DENIED

For the most part, Sinclair's cross-petition in No. 04-1177 reiterates arguments that are presented in the petitions filed in Nos. 04-1033, 04-1036, and 04-1045.[13] Although none of those arguments merits this Court's review, if the Court decides to address them, it may do so by granting one or more of the petitions in this case. There is no reason—and Sinclair offers none—why the Court should also grant a duplicative conditional cross-

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[12] Tribune's suggestion (04-1036 Pet. 25) that Section 202(h) eliminated the Third Circuit's authority to stay the revised rules is without merit. A court retains the authority to grant or withhold equitable remedies "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Section 202(h) does not contain any such restriction on the equitable authority of the courts.

[13] There is no basis for Sinclair's contention (04-1177 Cross-Pet. 9) that the Third Circuit's decision in this case "overrule[s]" the D.C. Circuit's decision in *Sinclair*. The *Sinclair* court concluded that the FCC had not provided an adequate explanation for limiting "voices" under the local television rule to television broadcasters. The Third Circuit below reviewed a different version of the local television rule in which the number of voices is no longer a factor and, therefore, did not consider the types of media that should count as "voices" under that rule.

petition that does not substantively add to the petitions already before the Court.

Nor should the Court entertain Sinclair's argument (04-1177 Cross-Pet. 14-16) that the local television ownership rule unconstitutionally "singles out" television broadcasters—an argument that is not otherwise presented in the petitions before the Court. The question whether television broadcasters have been singled out in violation of the First Amendment was not presented to the court of appeals by any party. Consequently, there is no decision of the court of appeals on that issue for this Court to review. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted).

Sinclair's argument that the local television ownership rule violates the First Amendment is in any event without merit. A regulation may "single[] out a certain medium" without violating the First Amendment if the regulation is "justified by some special characteristic of the particular medium being regulated." *Turner*, 512 U.S. at 660-661 (internal quotation marks omitted). Although, as Sinclair notes (04-1177 Cross-Pet. 15), the FCC concluded that viewers generally consider television broadcasting and cable networks to be "good alternatives for one another" in the market for delivered video programming (Pet. App. 298a-299a (Order ¶ 143)), it also found that, because cable networks typically offer programming on a nationwide basis, they "may respond differently [from television stations] to changes in local market concentration." *Id.* at 299a (Order ¶ 145). The FCC thus reasonably concluded that it should "focus on ownership of television broadcast stations, not cable networks, to promote competition in local television markets." *Id.* at 300a.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

ON PETITIONS AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should overrule its long-settled holdings in *Red Lion Broadcasting v. FCC* and *FCC v. National Citizens Committee for Broadcasting* that broadcast regulations receive rational basis review under the First Amendment, that newspaper-broadcast cross-ownership regulations do not impermissibly discriminate in violation of the First or Fifth Amendment, and that newspaper-broadcast cross-ownership regulations are content-neutral.

2. Whether the court of appeals' interpretation of §202(h) of the 1996 Telecommunications Act accords with the decisions of the only other court of appeals to have considered the issue.

3. Whether the court of appeals properly remanded for justification or modification certain aspects of the Federal Communications Commission's 2002 Biennial Regulatory Review Order that were not supported by the record or that lacked reasoned analysis.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Public Interest Respondents state as follows:

Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and National Council of the Churches of Christ in the United States have no parent companies or publicly-issued stock.

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STATEMENT

Public Interest Respondents[1] generally adopt the statement of the United States in this case, and write separately to underscore two additional points.

1. The court of appeals upheld much of the FCC's 2002 Biennial Regulatory Review Order ("*2002 Biennial*"). Pet. App. 1a-190a.[2] The court's comprehensive opinion properly notes that the scope of judicial review of federal agency action is "narrow" and that it is only authorized to remand an agency decision when "it is not supported by substantial evidence, or the agency has made a clear error in judgment." *Id.* at 25a (internal citations omitted). For example, the court upheld the FCC's decisions to relax its cross-ownership ban, *id.* at 40a, to retain the "top four" restriction on ownership of local television stations, *id.* at 72a, to revise its definition of local radio markets, *id.* at 85a, and to count "joint sales agreements" toward a radio station's permissible ownership total, *id.* at 96a.

2. The court of appeals was unanimous in its disposition of many key arguments raised by Petitioners and Cross-

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[1] Public Interest Respondents are Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and the National Council of the Churches of Christ in the United States.

[2] References are to the appendix filed by Petitioner in 04-1020.

Petitioners. The court unanimously rejected all of the constitutional challenges raised by Petitioners. *See* Pet. App. 107a. Chief Judge Scirica agreed with the majority on the proper legal standards for review of agency decisions, *compare id.* at 24a-26a, *with id.* at 116a-118a, but came to a different conclusion as to the application of those standards to certain specific rules.

REASONS TO DENY THE WRIT

Review by this Court would be premature. The court of appeals neither forbade nor compelled the implementation of specific rules; it simply remanded those rules that were without factual record support or rational agency explanation. Because many rules challenged by Petitioners are not expected to be retained on remand, review of those rules would likely be unnecessary. Further, all of the rules at issue in this case may be modified or repealed by the FCC during the next congressionally-mandated review of media ownership rules, which the FCC will conduct in 2006. This Court should not expend its scarce judicial resources to pass on specific rules that may be repealed or modified by the time its decision is issued.

More importantly, despite the voluminous record below, the proceeding did not focus on the core issue raised by many Petitioners—whether spectrum scarcity continues to exist. Accordingly, even assuming this Court should wish to revisit this fact-dependent question, this case would be a poor vehicle through which to do so.

Nor does this case present any broad, unsettled issues of law for this Court to review. The court below did not announce any new principle of constitutional law; it simply applied doctrine that has been clearly established by this Court. Petitioners present no valid reason for this Court to overrule this precedent. Further, the Third Circuit's interpretation of the relevant statute's standard of review provision is in com-

plete harmony with the explanation of the only other court of appeals to have considered it.

Stripped of its constitutional and statutory rhetoric, this case is simply about the application of properly articulated administrative law principles to a complex factual record. Such case-specific issues do not warrant this Court's intervention. Sup. Ct. R. 10.

I. PETITIONERS HAVE NOT DEMONSTRATED ANY COMPELLING REASON TO OVERRULE LONGSTANDING PRECEDENT

The appropriate standard of review for assessing the constitutionality of the FCC's broadcast ownership rules was decided by this Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). The court of appeals properly applied the standards established in *NCCB* to this case. Essentially conceding this point, three Petitioners nonetheless urge this Court to reconsider and overrule *NCCB*.

In *NCCB*, newspaper and broadcast station owners challenged the FCC's then recently adopted newspaper-broadcast cross-ownership rule, which was much more restrictive than the rules at issue in this case. The Court rejected the argument that the cross-ownership rule violated the First Amendment, finding that the argument "ignore[d] the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" 436 U.S. at 799 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)). The Court observed that the "physical limitations of the broadcast spectrum are well known" and that the number of frequencies used for broadcasting "is far exceeded by the number of persons wishing to broadcast to the public." 436 U.S. at 799.

This Court has repeatedly emphasized that the reconsideration of previous decisions should be approached with the utmost caution. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Indeed, just last term, this Court explicitly relied on *Red Lion* in upholding an important provision of the Bipartisan Campaign Reform Act of 2002. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 237 (2003). Because, as shown below, Petitioners present no compelling reason for this Court to reconsider its prior decisions, the Court should deny certiorari.

A. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Holding That Rational Basis Is The Appropriate Standard For Review Of Broadcast Regulations

As far back as 1943, this Court rejected a constitutional challenge brought by the broadcast networks against an FCC ownership rule known as the "chain broadcasting rule." The Court recognized that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943). Subsequently, in *Red Lion*, the Court explained that "in view of the limited number of available broadcasting frequencies," it did not violate the First Amendment for the FCC to require broadcasters to serve the public interest by providing certain types of programming. 395 U.S. at 394 (internal quotations omitted).

1. Neither Congress Nor The FCC Have Signaled That This Court Should Reconsider Its Approach to Broadcast Regulation

In *FCC v. League of Women Voters of California*, the Court concluded that "[w]e are not prepared . . . to reconsider our longstanding approach [of *Red Lion*] without some signal

from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984). This signal has not been given.

a. In this very proceeding, the FCC reaffirmed its support for the scarcity doctrine. Responding to arguments made by two of the present Petitioners, the FCC stated:

> We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits . . . . [T]he courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here. Accordingly, the rational basis test continues to apply to our ownership rules.

Pet. App. 218a (*2002 Biennial* ¶15). As this makes evident, the FCC is clearly not "signaling" this Court to reconsider the scarcity doctrine.

b. Nor has Congress indicated a desire for the Court to reconsider the scarcity doctrine. To the contrary, Congress has enacted numerous laws imposing public interest requirements premised on the continued existence of scarcity, and in some cases, reinforcing that scarcity.

For example, in the Children's Television Act of 1990, Congress explicitly found that as part of television stations' obligations to serve the public interest, stations should provide programming serving the special needs of children. Congress therefore directed the FCC to consider in renewing television licenses the extent to which the licensee has served the educational and informational needs of children. Chil-

dren's Television Act of 1990, Pub. L. No. 101-437, §§ 101(2), 103(a), 104 Stat. 996, *codified in part at* 47 U.S.C. § 303(a). *See also* H.R. Rep. No. 101-385 at 8 (citing *Red Lion* and rejecting suggestions of constitutional difficulties with Act).

In 1996, Congress added a new section to the Communications Act to establish a framework for the transition from analog to digital television. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201(a), 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 336 ("1996 Act"). Although this transition offered the opportunity for awarding additional broadcast licenses, Congress opted instead to limit eligibility for digital television licenses to the existing licensees. 47 U.S.C. § 336(a)(1). At the same time, Congress reaffirmed that television licensees were expected to continue to meet their obligation to serve the public interest. *Id.* at § 336(d). Thus, if anything, the 1996 Act actually increased scarcity by declining to make this spectrum available to new licensees.[3]

In 1997, Congress directed that the FCC utilize auctions to award all new commercial broadcast licenses, shifting away from a "comparative hearing" process whereby the FCC evaluated each applicant before awarding a license. Balanced Budget Act, Pub. L. No. 105-33, § 3301, 111 Stat. 251 (1997). This action was intended to address the inefficiencies of the hearing process that stemmed from the growing number of applications for new broadcast licenses. H.R. Rep. No. 105-149 at 558; *see also* Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 Hastings Comm. & Ent. L.J. 359, 439 (2003). In-

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[3] Tribune claims that Congress' requirement that the FCC redistribute spectrum after the digital television transition is complete demonstrates that it no longer believes the spectrum is scarce. 04-1036 Pet. 17. In fact, this leads to the opposite conclusion—if there were not more would-be users than available frequencies, Congress would have no reason to re-apportion the spectrum.

deed, the Balanced Budget Act relied upon spectrum scarcity in requiring that minimum amounts be raised by each auction. H.R. Rep. No. 105-149 at 569-72 (setting minimum amounts "[i]n recognition of the scarcity (and hence, the value) of spectrum"). Both the use of auctions and the high prices they generate[4] demonstrate that there continue to be far more would-be broadcasters than can be accommodated by the broadcast spectrum.

In 2000, Congress actually rolled back an FCC attempt to award additional broadcast licenses through the creation of a new, noncommercial low power FM radio service. A provision in the Department of Commerce and Related Agencies Appropriations Act of 2001 limited the number of low-power radio applications that the FCC could grant, due to concerns that allowing more radio stations on the air would interfere with existing broadcast stations. H.R. 5548 § 632, *enacted by* H.R. 4942, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

And finally, in early 2004, Congress passed legislation rolling back the FCC's relaxation of the national television audience limits. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004). As part of the *2002 Biennial*, the FCC increased the percentage of the national television audience that one company could "reach" from 35% to 45%. Congress overruled the FCC's decision

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[4] For example, the FCC's first ever open auction of the FM broadcast spectrum saw over 450 bidders participate, and resulted in 110 winning bidders paying nearly $150 million for a portion of the spectrum. News Release, FCC Announces Close to Unprecedented FM Auction (Nov. 24, 2004). The FCC noted that this auction "signifie[d] the continuing strong demand for radio broadcast spectrum." *Id.* In another example, eleven bidders vied for a single television station license in Blanco, TX; the winning bid approached $19 million. Public Notice, Blanco, Texas Broadcast Auction No. 80 Closes (July 18, 2000). One reason for the high prices generated by spectrum auctions is that "very few 'new' broadcast licenses are issued these days," a fact that is "the consequence of spectrum scarcity." Manheim & Solum, *supra*, at 441.

and rolled the cap back to 39%. If Congress did not believe that the spectrum was "scarce," it would have no reason to cap permissible ownership. As the D.C. Circuit explained, "[i]n the face of [the limited capacity of the spectrum], the national ownership cap increases the number of different voices heard in the nation . . . . But for the scarcity rationale, that increase would be of no moment." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

2. Spectrum Scarcity Continues To Exist As A Matter Of Fact

Various Petitioners nonetheless argue that this Court should reconsider *NCCB* and *Red Lion* because the factual predicate of the scarcity doctrine has been eroded by the development of cable television, direct broadcast satellites, and the internet. 04-1020 Pet. 10-11, 04-1036 Pet. 16, 04-1045 Pet. 26. But, as the court of appeals correctly recognized, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." Pet. App. 47a. Nor is there any conflict among the Circuits on this point. The D.C. Circuit recently rejected the same argument, noting that the "protest that *NCCB* [and the scarcity doctrine] is no longer controlling because it is undermined by the advent of cable television, DBS, and the internet, is to no avail." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002) (internal quotations and citations omitted); *see also American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (noting that the number of frequencies that can be productively used "is far exceeded by the number of persons wishing to broadcast").

Further evidence that there continue to be more would-be broadcasters than frequencies available for licensing is demonstrated by the large number of unlicensed broadcast stations that have been shut down by the FCC in recent

years.[5] Likewise, Media General's contention (04-1020 Pet. 12-13) that the scarcity doctrine has been undermined because this Court has not extended the doctrine to cable or internet regulations misses the point. As the *Red Lion*'s scarcity doctrine is based on the unique physical characteristics of the broadcast spectrum, the fact that the doctrine has not been extended beyond the broadcast arena in no way undercuts its viability in the broadcast arena. Spectrum scarcity exists today in the same form that it did when this Court first recognized the doctrine more than a half-century ago.[6] Further review of this factual question, which was not addressed by the FCC or the court of appeals and barely raised in the huge administrative record, is unwarranted.

3. There Is No Conflict Among The Circuits Regarding The Scarcity Doctrine

Contrary to many Petitioners' contentions, there is no conflicting authority among the courts of appeals regarding the scarcity doctrine or the appropriate level of scrutiny for broadcast regulations. Every Circuit has recognized that broadcasting regulation is subject to more deferential review

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[5] *See, e.g., Ruggiero v. FCC*, 317 F.3d 239, 242 (D.C. Cir. 2003); *Grid Radio v. FCC*, 278 F.3d 1314, 1316 (D.C. Cir. 2002); *Prayze FM v. FCC*, 214 F.3d 245, 250 (2d Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 218 F.3d 543, 549-50 (6th Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 459 (8th Cir. 2000); *United States v. Dunifer*, 219 F.3d 1004, 1005 (9th Cir. 2000); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam).

[6] Media General claims (04-1020 Pet. 22) that because modern technology has increased the amount of spectrum available for use, scarcity no longer exists. This is not the case. *Red Lion*'s observation that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace," 395 U.S. at 396-97, remains true today with the tremendous growth in cellular telephone service and other wireless services.

under the First Amendment due to the fact that more people wish to broadcast than the spectrum can accommodate.[7]

Tribune contends (04-1036 Pet. 13) that the Third Circuit's suggestion that it would endorse the scarcity doctrine "[e]ven were [it] not constrained by Supreme Court precedent," Pet. App. 47a, somehow creates a conflict with the D.C. Circuit. This is not so. While comments critical of the scarcity doctrine have sometimes appeared in dissenting or concurring opinions of the D.C. Circuit, *see, e.g.*, *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (dissent from denial of rehearing en banc); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) ("*ACT*") (Edwards, C.J., dissenting); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring), such comments are dicta, and conflicts involving dicta do not merit certiorari. *See, e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 124 S.Ct. 1750, 1754 (2004). Recognizing that *Red Lion* continues to "rule the

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[7] For example, the D.C. Circuit recently reviewed the FCC's system for awarding non-commercial educational broadcast licenses and held that the scheme was subject to deferential review under the First Amendment. It concluded that "[r]egulation of some form is an irreducible feature of any broadcast spectrum worth having, since 'a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public.'" *American Family Ass'n*, 365 F.3d at 1169 (quoting *NCCB*, 436 U.S. at 798). *See also Mark v. FCC*, 468 F.2d 266, 269 (1st Cir. 1972); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam); *Adventure Communications, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 439-40 (4th Cir 1999); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1039, 1043 (5th Cir. 1982); *United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Scott v. Rosenberg*, 702 F.2d 1263, 1272 (9th Cir.1983); *Cmty. Communications Co., Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981); *In re Beach Television Partners*, 38 F.3d 535, 536 (11th Cir. 1994).

broadcast jungle," *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1988), the D.C. Circuit has consistently and properly applied the scarcity doctrine. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1168; *Radio-Television News Dir. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) ("*RTNDA*"); *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 (D.C. Cir. 1986) ("*TRAC*"). Thus there is simply no conflict for this Court to review.

B. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Equal Protection Holding

Certain Petitioners also challenge the court of appeals' decision that rules barring newspapers from owning broadcast stations do not impermissibly discriminate in violation of the First or Fifth Amendment. As with the scarcity doctrine, this Court has already addressed this issue. In *NCCB*, the Court upheld a ban on newspaper-broadcast cross-ownership against an equal protection challenge, finding the regulations to be a "reasonable means" of promoting the FCC's objectives. 436 U.S. at 801-02. Indeed, even Media General acknowledges (04-1020 Pet. 24) that the *NCCB* Court rejected the argument that the cross-ownership regulations unfairly single out newspaper owners.

1. Nonetheless, Media General and Tribune argue that this Court should reconsider *NCCB* because "in *NCCB's* day, the only other 'major media of mass communications' besides newspapers were broadcast television and radio," while today other forms of mass media such as cable and internet are available. 04-1020 Pet. 24; *see also* 04-1036 Pet. 20. This misreads *NCCB*. The cross-ownership rule at issue in *NCCB* was not intended to diversify all major media of mass communication; rather, the FCC sought to regulate media cross-ownership to promote diversity of viewpoints within local communities. 436 U.S. at 786 (citing *Rules Relating to Multiple Ownership of Standard, FM, and Television Broad-*

cast Stations, Second Report & Order, 50 F.C.C.2d 1046, 1075 (1975) ("*1975 Order*")). The FCC excluded certain types of mass media, such as magazines and other periodicals that "dealt exclusively with regional or national issues and ignored local issues." *1975 Order*, 50 F.C.C.2d at 1080 ¶112; *see also NCCB*, 436 U.S. at 787 n.10. Thus, in 1975, the FCC recognized that other major mass media existed, but chose to restrict common ownership of only those media that covered local issues—specifically newspapers, broadcast television, and broadcast radio.

Similarly, in the *2002 Biennial,* the FCC sought to "preserv[e] viewpoint diversity among local, not national, news sources." Pet. App. 484a-485a (*2002 Biennial* ¶399). Thus, the FCC excluded "the large number of *national* news sources such as all-news cable channels and the news sources on the Internet." *Id.* (emphasis added). Finding that "broadcast television, daily newspapers, and broadcast radio" continue to be "the three media platforms that Americans turn to most often for local news and information," *id.* at 520a (*2002 Biennial* ¶452), the FCC appropriately limited the cross-media limits to the media that are the most significant sources of local news.

Petitioners Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC ("NAA") (04-1045 Pet. 27), along with Media General (04-1020 Pet. 25), also claim that the specific cross-ownership regulations adopted in the *2002 Biennial* violate *NCCB*'s equal protection holding because they treat newspaper owners somewhat differently than radio and television station owners. Again, these Petitioners misread *NCCB*. *NCCB* merely required the cross-ownership regulations reviewed below to treat newspaper and broadcast owners "in *essentially* the same fashion." 436 U.S. at 801 (emphasis added). As with the rules at issue in *NCCB*, the cross-ownership regulations treat newspaper and broadcast owners

essentially the same way in that all are restricted in their ability to own another type of local media. *See* Pet. App. 452a. Moreover, contrary to Media General's absolute statement that "a cable company may buy a broadcast station even where a newspaper may not," 04-1020 Pet. 24, a newspaper owner may receive a waiver of the rule to co-own a broadcast station in certain circumstances. Pet. App. 437a (*2002 Biennial* ¶481).

2. The court of appeals' decision not to apply heightened scrutiny to the cross-ownership regulations does not conflict with any decision of this Court. The *NCCB* Court did not apply heightened scrutiny in its disposal of the equal protection challenges, but rather found that content-neutral regulations that prevent any person from owning both a newspaper and a broadcast station are a "*reasonable means* of promoting the public interest in diversified mass communications." 436 U.S. at 802 (emphasis added).

Moreover, *NCCB*'s use of rational basis review is fully consistent with this Court's recent jurisprudence. Tribune and Cross-Petitioner Sinclair Broadcast Group, Inc. ("Sinclair") rely (04-1036 Pet. 21-22, 04-1177 Pet. 15) on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") to argue that *any* regulation that distinguishes between classes of media outlets demands heightened scrutiny. However, this argument is directly precluded by *Turner I*'s admonition that "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." 512 U.S. at 660. *Turner I*'s touchstone for determining the level of scrutiny is the type of medium; "heightened scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660-61 (internal citations omitted). As the cross-ownership restrictions apply

to broadcast media, the "special characteristic" of spectrum scarcity makes heightened scrutiny unwarranted.

The other cases relied upon by Tribune (04-1036 Pet. 21-23; *see also* 04-1177 Cross-Pet. 15) are inapposite to the question of the proper standard of review of content-neutral broadcast regulations. *League of Women Voters* applied heightened scrutiny because the statute in question was a *content-based* speech restriction. 468 U.S. at 383.[8] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), considered the constitutionality of a tax imposed only on newspapers, and is directly analogous to *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which the *NCCB* Court held not to be controlling on the question of cross-ownership regulations, 436 U.S. at 801. Finally, the two court of appeals decisions cited by Tribune (04-1036 Pet. 22-23) concerned regulation of telephone companies, and both cases expressly recognized that broadcast ownership regulations receive a different and lower level of constitutional scrutiny.[9]

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[8] *See also Fox Television Stations*, 280 F.3d at 1046 (rejecting heightened scrutiny because the rule at issue, "unlike the [rule] at issue in *League of Women Voters*, is not a content-based regulation; it is a regulation of industry structure, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in *NCCB*").

[9] Further, both cases were vacated by this Court. *US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 191 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (per curiam).

C. The Court Below Did Not Address Whether Cross-Ownership Regulations Are Content-Based; Nor Have Petitioners Presented Compelling Reason To Revisit *NCCB*'s Holding That Such Regulations Are Content-Neutral

Media General's and Tribune's contention (04-1020 Pet. 26; 04-1036 Pet. 23) that the cross-ownership regulations should have been subjected to heightened scrutiny because they are content-based restrictions on speech likewise provides no basis for reconsidering *NCCB*. As a threshold matter, review of this argument is inappropriate because it was not addressed in the decision below. This Court "do[es] not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

Certiorari is also unnecessary because this Court has already addressed the question, specifically holding that newspaper-broadcast cross-ownership regulations "are not content related." *NCCB*, 436 U.S. at 801. Lower courts have properly followed that decision, recognizing that cross-ownership rules are simply structural regulations that receive minimal constitutional scrutiny. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1169; *Ruggiero*, 317 F.3d at 244.

In any event, the court of appeals' decision that the structural cross-ownership regulations are not content-based is correct. As this Court has explained, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The cross-ownership regulations were not at all motivated by the message of the speaker, but rather were developed to ensure a diversity of media voices was available to the public. Pet. App. 481a-482a (*2002 Biennial* ¶¶393-94). "[B]y placing a value upon diversity the FCC did not necessarily . . . value one speaker, or one type of speech over another; it merely

expressed its intention that there continue to be multiple speakers." *American Family Ass'n*, 365 F.3d at 1169 (internal quotations omitted).

The D.C. Circuit has held that analogous regulations of the structure of cable ownership that were motivated by diversity concerns were not content-based. In *Time Warner Entertainment Co. v. United States*, the court noted that "[a]s the Supreme Court made quite clear in *Turner I*, . . . making way for some speakers" in a context like broadcasting "where that necessarily means limiting the speech of others, is not inherently content-based." 211 F.3d 1313, 1317 (D.C. Cir. 2000). This same, traditional rationale clearly applies to the present regulations—rules restricting broadcast ownership to promote a diversity of media outlets are not subject to heightened First Amendment scrutiny.

D. Should The Court Wish To Reconsider Its Constitutional Precedent, Other Cases Offer A Better Opportunity For Fully Assessing The Issues

The *2002 Biennial* focused on specific ownership rules and not the factual underpinnings of the scarcity doctrine. Any reference to the continued existence of spectrum scarcity was an inconsequential piece of a massive record, and the factual basis for doctrine was not addressed on the merits by the FCC or the court of appeals. Re-examination of the scarcity doctrine would be a fact-intensive process. The present case plainly does not afford this Court a sufficient record or factual basis for such a task.

Moreover, as a practical matter, this case does not present an actual cross-ownership rule for constitutional review. Because the court below agreed with the FCC that the original newspaper-broadcast cross-ownership rule was no longer necessary, *see* Pet. App. 40a, there is no need to re-evaluate the constitutionality of that rule. On the other hand, since the court found that the replacement rule adopted by the FCC

was arbitrary and capricious and subject to further proceedings on remand, it would make no sense to evaluate the constitutionality of that rule at this time.

Further, the FCC has before it at least three licensing cases that squarely present the issue of whether the cross-ownership prohibition is constitutional. Specifically, Media General has filed license renewal applications asking the FCC to waive the newspaper-broadcast cross-ownership rule to allow it to continue to own both a daily newspaper and a television station in the Myrtle Beach-Florence, South Carolina, Panama City, Florida, and Columbus, Georgia DMAs.[10] In making its waiver requests, Media General argues that spectrum scarcity no longer exists and thus the cross-ownership rules are unconstitutional. *See, e.g.* Application for Renewal of Broadcast Station License for WBTW, Media General Opposition to Petition to Deny 39-44 (Dec. 14, 2004). Because these cases present the issue in specific, concrete factual settings, yet do not raise the wide variety of issues presented in the *2002 Biennial*, any one would present a better vehicle for revisiting the constitutional issues raised by Petitioners in this case, should this Court be inclined to do so.

II. THERE IS NO CONFLICT OVER THE INTERPRETATION OF §202(h) OF THE 1996 TELECOMMUNICATIONS ACT

Petitioner National Association of Broadcasters ("NAB"), along with Tribune, NAA, and Respondent Clear Channel Communications, Inc. ("Clear Channel")[11] assert there is a

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[10] Application for Renewal of Broadcast Station License for WBTW, FCC File No. BRCT-20040802BIK (Aug. 6, 2004), Application for Renewal of Broadcast Station License for WMBB, FCC File No. BRCT-20041001AQF (Oct. 7, 2004), Application for Renewal of Broadcast Station License for WRBL, FCC File No. BRCT-20041210BZP (Dec. 8, 2004).

[11] Clear Channel is a Respondent in 04-1033.

circuit split with respect to the FCC's construction of §202(h) of the 1996 Act. This is not so. All three members of the panel agreed that the court of appeals' construction is consistent with that of the D.C. Circuit. Their ruling that the periodic review mandated by §202(h) should employ the normal arbitrary and capricious test generally required by the Administrative Procedure Act is clearly correct and should not be disturbed. Nor is there reason for this Court to examine the court of appeals' unanimous conclusion that §202(h) allows the FCC to adopt stronger rules at the conclusion of the review process.

Although each of the petitioners emphasize the deregulatory thrust of the 1996 Act, there is no suggestion that the ruling below conflicts with any other circuit on this point. *See* Pet. App. 34a (majority noting that 1996 Act is deregulatory); Pet. App 122a (concurring judge noting the "deregulatory flavor" of the 1996 Act). Nor do any of the Petitioners point to express language in any statute that prohibits the FCC from increasing its regulatory oversight when the record justifies such action. Under this Court's jurisprudence, the FCC is entitled to deference in construction of statutory ambiguities such as this, *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and the petitions surely do not raise an issue here that would support issuance of a writ of certiorari.

1. Tribune, NAA, Sinclair, and Clear Channel argue that the Third Circuit's holding that §202(h) does not impose a more exacting standard of review is in conflict with that of the D.C. Circuit. *See* 04-1036 Pet. 24-26; 04-1045 Pet. 19-23; 04-1177 Cross-Pet. 11-12; Clear Channel Br. 24-27. These arguments mischaracterize the sequence in which the FCC and the D.C. Circuit acted and downplay the D.C. Circuit's definitive decision in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). As the Third Circuit joined *Cellco*

in holding that the phrase "necessary in the public interest" [12] did not create a deregulatory presumption, and "endorsing the [FCC]'s view that 'necessary' must mean the same thing in the periodic review context as in the rulemaking context," Pet. App. 31a, there is no conflict.[13]

Clear Channel's quotations of fragments from *Cellco* are misleadingly incomplete, as can be seen by reference to the complete passages from which Clear Channel quotes. For example, Clear Channel claims that *Cellco*, "expressly extended to Section 11 the 'presumption in favor of repealing or modifying covered rules' that the D.C. Circuit had found inherent in Section 202(h)." Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 97). What *Cellco* actually said was that "the [FCC] agreed that *where §11's conditions are met*, §11 creates a presumption in favor of repealing or modifying" the

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[12] The provision directly at issue in *Cellco* was §11 of the 1996 Act, a biennial review provision that, just like §202(h), requires the FCC to repeal or modify regulations no longer "necessary in the public interest."

[13] Petitioners rely on the D.C. Circuit's pre-*Cellco* decisions in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox I*"), and *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"). However, the D.C. Circuit later modified the *Fox I* decision to "leave unresolved precisely what §202(h) means." *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002) ("*Fox II*"). Moreover, *Cellco* explicitly discussed and harmonized its ruling with those in *Fox I*, *Fox II* and *Sinclair*. 357 F.3d at 97-98. The *Cellco* panel pointed out that "shortly after *Sinclair* was decided, the court in [*Fox II*] retracted *Fox I*'s definition of 'necessary'" and that "the court in *Sinclair* did not adopt a general presumption in favor of modification or elimination of regulations." 357 F.3d at 98. Thus, for example, when NAB refers (04-1033 Pet. 22, *see also* 04-1036 Pet. 24, 04-1045 Pet. 19) to *Fox I* and *Sinclair* as imposing "a presumption in favor of repealing or modifying the ownership rules," it ignores the subsequent *Cellco*, ruling, which specifically stated that "neither *Fox I* nor *Sinclair* adopted a controlling definition of 'necessary,' much less the position that §11 embodies a presumption in favor of deregulation." 357 F.3d at 98. Importantly, the *2002 Biennial*, which purports to rely on *Fox I* and *Sinclair*, Pet. App. 215a (*2002 Biennial* ¶11), was issued prior to the *Cellco* decision.

rules. 357 F.3d at 97 (emphasis added). Indeed, there is no dispute within or among the circuits that when a regulation is found no longer to be in the public interest that there is a presumption in favor of repeal or modification. *See id.* at 99. Similarly, although Clear Channel claims that *Cellco* imposes obligations that go "beyond [the FCC's] normal monitoring responsibilities," Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 99), the decision's preceding sentence makes clear that the *Cellco* court was referring to remedies, not the threshold test. 357 F.3d at 99 ("The [FCC] reasonably concluded that the deregulatory presumption arises only after it has determined under §11(a) that a regulation is no longer necessary in the public interest.").

2. NAB, supported by Clear Channel, presents a second statutory argument, claiming that the deregulatory goals of the 1996 Act permit the FCC only to deregulate and precludes it from ever tightening its radio ownership regulations at the conclusion of a biennial review. 04-1033 Pet. 19-26; Clear Channel Br. 20-24. There is no suggestion of a circuit conflict on this point, and no specific statutory provision governs this question. This, then, is also an issue as to which the FCC is entitled to substantial deference. *See, e.g.,. Mead,* 533 U.S. at 229.

NAB argues (04-1033 Pet. 22) that "Sections 202(b) and 202(h) together express a clear directive that local ownership restrictions not be tightened," but none of the language it cites from the statute or the D.C. Circuit's *Fox* and *Sinclair* decisions addresses the particular issue presented here. To say that "Congress set in motion a process to deregulate the structure of the broadcast and cable industries," 04-1033 Pet. 22 (quoting *Fox I*, 280 F.3d at 1033), is not inconsistent with an agency determination that the deregulatory process can be accomplished with one step backward and three steps forward.

Both NAB and Clear Channel likewise maintain that the phrase "repeal or modify" must be read so that "modify" means only "that the [FCC] can relax existing restrictions; it does not authorize the [FCC] to tighten them." 04-1033 Pet. 23; *see also* Clear Channel Br. 20, and that the court of appeals ruling "conflicts with the text and structure of Section 202 as a whole." Clear Channel Br. 21. There is no basis to disturb the court of appeals' holding on this point. As the panel majority reasonably explained, the deregulatory goal of §202(h) is fulfilled by "requir[ing] the [FCC] periodically to justify its existing regulations, an obligation it would not otherwise have." Pet. App. 34a. *See also id.* at 124a ("Despite §202(h)'s admittedly deregulatory tenor, the statute does not foreclose the possibility of increased regulation under the biennial review if the [FCC] finds such action in the public interest.") (Scirica, C.J., concurring in part and dissenting in part). There is nothing important or novel about this garden variety question of statutory construction, or the resolution of it below, much less anything which would rise to the level of significance to merit this Court's attention.

III. ROUTINE APPLICATION OF WELL-SETTLED ADMINISTRATIVE LAW STANDARDS DOES NOT MERIT THIS COURT'S INTERVENTION

1. Both NAA and the Government's Conditional Cross-Petition contend (04-1045 Pet. 23-25; 04-1168 Cross-Pet. 21-28) that the court of appeals did not afford sufficient deference to the FCC's decisionmaking.[14] Yet neither claims that

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[14] The deference claim is not raised by other industry Petitioners. Like Public Interest Respondents, many industry Petitioners argued to the court below that certain FCC decisions were arbitrary and capricious. *See* Pet. App. 52a (industry petitioners argued exclusion of cable but inclusion of internet in diversity index arbitrary and capricious); 58a (industry petitioners argued "equal market shares" assumption arbitrary and capricious); 103a (industry petitioners argued specific local radio limits arbitrary and capricious).

the court failed to articulate the correct deference standards. *See* 04-1045 Pet. 24; 04-1168 Cross-Pet. 23, 27. Indeed, the court below correctly noted that its scope of review was narrow, Pet. App. 25a, that it was not to substitute its judgment for that of the agency, *id.*, and that "[d]eference to the [FCC]'s judgment is highest when assessing the rationality of the agency's line-drawing endeavors," *id.* at 62a. The court remanded only when the agency's decision was "not supported by substantial evidence." *Id.* at 25a. Importantly, there was no disagreement between the majority and Chief Judge Scirica about the proper legal standards, *compare id.* at 24a-26a, *with id.* at 116a-118a; the only disagreement was over the application of those standards to specific rules at issue. At bottom, NAA and the Government simply quarrel over this application of law to fact. That issue does not merit review. Sup. Ct. R. 10.

2. Notwithstanding the fact that this issue does not warrant intervention by this Court, the court of appeals' decision to remand certain rules was correct. The Government claims (04-1168 Cross-Pet. 21) that the court of appeals should have deferred to the FCC's decision to assume equal market shares for outlets within the same media. The flaw in this argument, as the court observed, is that this equal market share assumption conflicted with other parts of the *2002 Biennial*, where the FCC expressly found that there was "no reason to believe that all media are of equal importance." Pet. App. 59a (quoting *2002 Biennial* ¶409). The court correctly pointed out that "the assignment of equal market shares generates absurd results," such as the Dutchess Community College television station receiving a market share *equal to* New York City's ABC affiliate and *higher than* the *New York Times*. Pet. App. 59a. In sum, the court found that "assuming equal market shares [is] unrealistic and inconsistent with the [FCC]'s overall approach . . . and proffered rationale," and thus it properly remanded that decision. *Id.* at 61a.

The Government also questions (04-1168 Cross-Pet. 24) the deference given to the FCC's decision to give substantial weight to the internet in the FCC's Diversity Index. Once again, however, the court appropriately remanded in light of the FCC's failure to explain obvious inconsistencies. The court correctly noted that the FCC's rationale for excluding cable television from the Diversity Index also necessarily applied to the internet. *See* Pet. App. 52a-58a. For example, while the FCC discounted cable where a survey suggesting that cable was a source of local news conflicted with other record evidence, the FCC failed to discount the internet under analogous circumstances. *Id.* at 55a.[15] Because the similarities between cable television and the internet required consistent treatment, the court properly found that the "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was irrational." *Id.* at 52a.

Finally, the Government challenges (04-1168 Cross-Pet. 27-28) the court of appeals' review of specific limits chosen regarding cross-media and local radio station ownership. But in fact the court *upheld* many of the FCC's line-drawing decisions, *see id.* at 75a (upholding "top-four restriction" on local TV ownership), 85a (upholding local radio market definition), only remanding those that were marred by inconsistencies. For example, the specific limits created by the FCC, purportedly developed to prevent "problematic levels of concentration," *id.* at 509a (*2002 Biennial* ¶435), would have allowed certain media combinations resulting in considerably higher concentration levels than others that were prohibited. The court correctly held that "[t]he [FCC]'s failure to provide any explanation for this glaring inconsistency is without a

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[15] Further, the court noted that the FCC's attempt to justify the differential treatment by arguing that local cable news is not available to everyone while the internet is was inconsistent with the FCC's recognition (elsewhere in the *2002 Biennial*) that nearly one-third of Americans have no internet access. Pet. App. at 57a-58a.

doubt arbitrary and capricious." *Id.* at 63a. Thus, while the court properly engaged in highly deferential review of specific limits chosen by the FCC, it did not abdicate its responsibility to remand when the lines drawn were not supported by the record and therefore "patently unreasonable." *Sinclair*, 284 F.3d at 162.[16]

It is a truism that this Court is "'[a] court of law . . . rather than a court for correction of errors in fact finding.'" *Missouri v. Jenkins*, 515 U.S. 70, 162 (1995) (Souter, J., dissenting) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949)). As the decision below rests upon a correct understanding of this Court's principles of administrative deference, Petitioners' contention is simply that the court of appeals misapplied the law to the facts of this case. As explained above, that case-specific issue does not merit this Court's attention.

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[16] The Government also challenges (04-1168 Pet. 27-28) the remand of the FCC's specific local radio ownership limits. Once again, the court of appeals remanded these limits because of the irrational and inconsistent manner in which they were developed. For example, the court pointed out that the FCC failed to explain why it ignored the DOJ/FTC Merger Guidelines in developing the local radio limits, but expressly relied on the Guidelines in developing analogous local television ownership limits. Pet. App 103a. Further, while the rationale for the local radio ownership limits depended heavily on the theory that a certain number of equal-sized competitors would make a market competitive, the court correctly noted that "record evidence supports neither actual nor potential existence of equal-sized competitors" in the local radio market. *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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